

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: : 09-MD-02120
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PAMIDRONATE PRODUCTS LIABILITY : 225 Cadman Plaza East
LITIGATION, : Brooklyn, New York
:
: February 2, 2011
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONIC HEARING
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Pamidronate Products DANIEL ADAM OSBORN, ESQ.
Liability Litigation: Osborn Law, P.C.
295 Madison Avenue - 39th Floor
New York, New York 10017

For Evan Chandler: JOHN JULIAN VECCHIONE, ESQ.
RON MELLOTT, ESQ.
Valad and Vecchione
3863 Plaza Drive
Fairfax, Virginia 22030

For Plaintiffs: ROBERT G. GERMANY, ESQ.
Stripling McMichael &
Stripling PA - Gainesville Fl.
102 Northwest Second Avenue
PO Box 1287
Gainesville, Florida 32602

For Ben Venue ERIC HUDSON, ESQ.
Laboratories: Butler Snow O'Mara Stevens &
Cannada, PLLC
6075 Poplar Avenue - 5th Floor
Memphis, Tennessee 38119

(Appearances continue on next page.)

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3 APPEARANCES CONTINUED:

4 For APP Pharmaceuticals: ERIN BOSMAN, ESQ.
Morrison & Foerster
5 12531 High Bluff Drive
Suite 100
6 San Diego, California 92130

7 For Hospira: CHRISTINA L. GAARDER, ESQ.
Venable, LLP
8 750 East Pratt Street - Suite 900
Baltimore, Maryland 21202

9

10 For Teva Parenteral NILDA MARIA TULLA-ISIDRO, ESQ.
Medicines, Inc.: Goodwin Procter LLP
11 The New York Times Building
620 Eighth Avenue
12 New York, New York 10018

13 For Sandoz, Inc.: THEODORE M. LIS, ESQ.
STEPHEN KLEIN, ESQ.

14

15

16 Court Transcriber: RUTH ANN HAGER
TypeWrite Word Processing Service
17 211 N. Milton Road
Saratoga Springs, New York 12866

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1 (Proceedings began at 3:09 p.m.)

2 THE COURT: Hello. This is Judge Matsumoto.

3 MR. OSBORN: Good afternoon, Judge.

4 THE COURT: All right. Let me just call the case.

5 This is the Pamidronate Products Liability Litigation, 09-MD-
6 02120. And let me first get the appearances, if I may, of the
7 plaintiffs' counsel on the line.

8 MR. OSBORN: Good afternoon, Judge. Dan -- I'm
9 sorry, John.

10 MR. VECCHIONE: Go right ahead, Dan.

11 MS. OSBORN: Daniel Osborn.

12 THE COURT: All right. Thank you. Who else?

13 MR. VECCHIONE: John Vecchione and with me from a
14 different location in case I'm dropped is my associate Ron
15 Mellot.

16 THE COURT: I'm sorry. What is the name?

17 MR. VECCHIONE: Ron Mellot, M-E-L-L-O-T. He's also
18 on the line.

19 THE COURT: All right. Thank you. Good afternoon.
20 Is there anyone else for the plaintiffs?

21 MR. GERMANY: Yes, Judge. Robert Germany.

22 THE COURT: All right. Thank you. Anyone else?
23 Stripling? No?

24 MR. GERMANY: Mr. Stripling is in the cases with me,
25 Your Honor.

1 THE COURT: All right. Okay. Thank you. Let's
2 just next find out who among the defense counsel are here.
3 Start -- I'm just going to call the name of the defendant if
4 you could bear with me for one minute.

5 Ben Venue Labs.

6 MR. HUDSON: Eric Hudson.

7 THE COURT: Okay. Thank you.

8 Novartis? Oh, they're gone.

9 Okay. APP Pharmaceuticals?

10 MS. BOSMAN: Erin Bosman.

11 THE COURT: Thank you. And what about Hospira.

12 MS. GAARDER: Christina Gaarder.

13 THE COURT: Thank you. Teva.

14 MS. TULLA-ISIDRO: Nilda Tulla.

15 THE COURT: All right. Thank you. And Bedford.

16 MR. HUDSON: Eric Hudson.

17 THE COURT: Oh, thank you. I'm sorry. And let's
18 see. APP Pharmaceuticals. We've gotten them. Okay.

19 Sandoz.

20 MR. LIS: Yes, Your Honor. Ted Lis and Stephen
21 Klein.

22 THE COURT: Stephen Klein. I don't think Mr. Klein
23 has yet appeared in this case but I'll note his appearance and
24 ask that he enter an appearance on the docket in this case.
25 Stephen with a V or a P-H?

1 MR. KLEIN: Your Honor, it's with a P-H.

2 THE COURT: Okay. Thank you. K --

3 MR. KLEIN: K-L-E-I-N.

4 THE COURT: Thank you. Is there anyone who I
5 overlooked? All right.

6 I have -- we scheduled this conference at the
7 request of the defendants who signed a letter dated January
8 21st asking for leave to file motions pursuant to Rule
9 12(b)(6) for failure to meet the minimum pleading requirements
10 under 8(a); and, further, to dismiss for failure to comply
11 with Judge Gold's orders that authorizations be provided by
12 January 7th and also to set up possible briefing for other
13 issues relating to each of the various claims. And I also
14 have read a letter dated January 26th from plaintiff's
15 counsel, Mr. Osborn, who proposes a meeting with the parties
16 to try to narrow and reduce, if possible, the number of
17 motions. Is that something the parties have discussed any
18 further or is there a willingness by the parties to do that?

19 MS. BOSMAN: Your Honor, this is Erin Bosman for APP
20 Pharmaceuticals. The defense group has discussed this. We
21 are not open to meeting and conferring further on this issue.
22 It is our position that the plaintiffs have had a year since
23 our last meeting with you to conduct product ID discovery and
24 to narrow down their claim to naming the proper defendants so
25 we see no further reason to meet and confer at this point.

1 THE COURT: All right. Well, then let me just ask
2 about the issue of the serial motions that are possibly being
3 proposed. I think that the amended pleadings seem to reflect
4 that we have 15 different, if not more, states of residence of
5 the various plaintiffs and possibly -- I don't know if this is
6 an issue -- did all of the plaintiffs receive treatment in
7 their home states of residence or not?

8 MR. OSBORN: This is --

9 MR. VECCHIONE: This is John Vecchione. Most of
10 them did but some did not and some of them are on border
11 states on one side of the line and the other.

12 THE COURT: Have you provided the information to the
13 defendants as to which plaintiffs reside in one state but
14 receive treatment in another state?

15 MR. VECCHIONE: I believe I have by letter but if I
16 have not I'm happy to clarify that.

17 MS. BOSMAN: Your Honor, this is Erin Bosman. We do
18 not have that information for the majority of the plaintiffs.
19 And, for instance, the Irrigon [Ph.] amended complaint there
20 is simply a chart that lists a state. It does not tell us
21 residence or -- residence at the time of treatment, where the
22 treatment was or if this is where they're currently residing.

23 THE COURT: Yeah. I note that it just says
24 "states." So states for what purpose?

25 MR. OSBORN: Well, Your Honor, this is Mr. Osborn.

1 Two things. One is I don't quite understand why the
2 defendants don't want to meet. I think there are benefits
3 that could be derived and there are efficiencies that could be
4 achieved that would certainly cut down on the number of
5 motions. And when they say that we've had a year to conduct
6 discovery that's not quite accurate because it's really been
7 what we could find in our own. It's almost like prelitigation
8 work that we've been doing, investigations because the
9 defendants have not had to produce really anything. So we've
10 been a little bit handicapped and I still think that there's
11 value to having a meeting because we have produced to the
12 defendants tens of thousands of pages of medical records that
13 we, the plaintiffs, have subpoenaed.

14 We have identified in a number of instances the
15 specific manufacturer that goes to a specific plaintiff so I
16 think the representation in their letter was not quite
17 accurate. But to the point that was just raised by Ms.
18 Bosman, we were told by Judge Gold to identify the ven -- the
19 state I think or the venue whatever it was for these
20 plaintiffs to resolve issues of state law. It wasn't so that
21 the defendants could know exactly what courthouse they might
22 have to defend one of these cases in. We weren't told to
23 identify the exact place they took it, the exact dates they
24 took it. We've never done that in any of our complaints --

25 THE COURT: Well, if the --

1 MR. OSBORN: -- so --

2 THE COURT: Okay. But this is my concern. I don't
3 know whether under these numerous state laws the issues would
4 be determined by the place where the action arose, which might
5 be in the place of treatment or whether it arose -- whether we
6 should be applying the law of the state in which the plaintiff
7 resides and --

8 MR. OSBORN: I think, Your Honor, that joint --

9 THE COURT: What is that last column? Is it a
10 residential column or is it a treatment column?

11 MR. OSBORN: It's a residence column. It's talking
12 about Schedule B to the Irrigon complaint, Your Honor. And I
13 would join Mr. Vecchione in offering, too, we will provide --
14 if the residency differs from the place of infusion we'll
15 provide that information in joint order to the defendants.
16 That's not a problem.

17 MS. BOSMAN: Your Honor, this is Erin Bosman. I
18 would just like to respond to a few of Mr. Osborn's comments.
19 He is stating that they have been handicapped, the plaintiff
20 has and that they have had to go through what he makes it
21 sound as if it was an extraordinary procedure to get this
22 identification. What the point is and what defendants have
23 been stating for the last year, this is the plaintiff's burden
24 and the plaintiff's obligation to bring a complaint that is
25 properly pled. They need to identify the proper manufacture.

1 That is not our burden. The defendants don't need to do
2 anything in this process. The fact that all of these medical
3 records have been provided does not then switch the burden to
4 the defendants to look through and to tell the plaintiff who
5 is the proper manufacturer for each of their individual
6 plaintiffs so that they can properly plead their complaints.
7 That's the problem here. The decision has --

8 MR. OSBORN: Your Honor, we've never --

9 MS. BOSMAN: -- actually produced -- just a
10 second --

11 MR. OSBORN: We've never asked for that to be done.

12 MS. BOSMAN: The defendants have --

13 THE COURT: Please don't --

14 MS. BOSMAN: -- produced discovery that was
15 requested and that Judge Gold asked us to produce and we have
16 done so, but what this comes down to is the failure to state a
17 claim as the complaints are currently pled.

18 MR. OSBORN: Your Honor, if I could -- this is Mr.
19 Osborn. Just to advance the ball a little bit, I read their
20 letter a little bit differently which was they want to move on
21 12(b)(6) now as to all of them and that's fine. I've never
22 participated in one of these conferences where the parties
23 weren't allowed to make the motion so I'm assuming they'll be
24 able to make that 12(b)(6) motion, but I did read their letter
25 to say let's do that first and then let's look at these other

1 potential motions and that might help us a little bit in terms
2 of today's conference. Maybe I'm reading the letter wrong.

3 MS. BOSMAN: That is correct. We were -- how the
4 defendant had proposed this was that we would first move
5 simply on the Iqbal and failure to properly plead the cause of
6 action and to deal with those because the thought being from
7 the defendants that it might make it really easier for the
8 Court and for the plaintiffs to manage because if that is
9 going to get rid of a number of these it reduces the number of
10 choice of law issues that we would have to deal with because
11 then when we get into the other grounds for motions to dismiss
12 statute of limitations, issues with breach of warranty and
13 things like that, again it comes into play on where the
14 treatment was provided, where the residence is, and looking at
15 the choice of law.

16 THE COURT: All right. Now, in terms of any market
17 share states are we -- how do you propose addressing that? In
18 the context --

19 MS. BOSMAN: Your Honor --

20 THE COURT: -- in the context of the Rule 12(b)(6)
21 motions.

22 MS. BOSMAN: The -- I do understand that in the
23 plaintiff's letter to the Court they state that they have pled
24 market share liability. We have not seen in any of the
25 amended complaints where market share allegations have been

1 made.

2 MR. GERMANY: They're in all four of mine. This is
3 Bob Germany.

4 MS. BOSMAN: Could you direct us to the paragraph
5 where we could find that?

6 MR. GERMANY: Sure. I don't have it right here in
7 front of me but I'll be happy to have them pull it and I can
8 tell you.

9 THE COURT: I don't know if -- well, there's a
10 paragraph 41. I don't know if that it, but listen, folks.
11 The last thing in the world we want is multiple, multiple
12 motions that are going to force the Court to go digging
13 through the pleadings to figure out where some little nugget
14 of fact might exist. I would hope that the defendants would
15 be willing to at least try to talk about which plaintiffs'
16 claims might be dismissed because I remember very clearly over
17 a year ago meeting with the parties with Judge Gold and
18 plaintiff's counsel repeatedly assuring the Court and defense
19 counsel that if after due diligence they could not identify a
20 particular manufacturer they were willing to cut loose and
21 dismiss certain of their claims. And if that's the purpose of
22 your meeting I don't even know if you need a meeting for that,
23 but why not just take care of it and dismiss those claims? Is
24 that something that --

25 MR. VECCHIONE: Your Honor --

1 THE COURT: Is that something the plaintiffs'
2 counsel was willing to do or contemplated?

3 MR. VECCHIONE: This is John Vecchione and I believe
4 I made the statement that if I -- I was happy to drop cases
5 and I believe I said market share liability was my last
6 resort. Well, for some of my complaints I've identified the
7 manufacturer and I have dropped the people who I know didn't
8 do it. For others I have not that and I have pled market
9 share in the complaint because it's a valid -- in my view it's
10 a valid claim under those state laws. And if they don't have
11 it then I haven't pled it and I've offered to drop two of the
12 plaintiffs.

13 So I did not -- since I'm the one who made that
14 statement I said it was my last resort. I've said that again
15 and again but sometimes you have to take your last resort.
16 And I believe I also have pled market share where I did not
17 have the -- I've not been able to identify the manufacturer
18 but that the -- there are state law -- state law doesn't
19 prohibit it.

20 THE COURT: All right. So how -- I guess from a
21 question to the defense counsel, then. Does it make sense to
22 proceed as you propose to just address the sufficiency of the
23 pleadings under Iqbal and not to address those complaints
24 where market share is pled? I know the defense counsel do not
25 agree that the plaintiffs have pled market share, but they're

1 telling me they have and they're going to identify for all of
2 us where those allegations exist in their complaints. But it
3 does seem to me that to the extent certain complaints or
4 plaintiffs may have pled the alternative market share then it
5 doesn't -- it makes it difficult or maybe pointless and a
6 waste of everyone's time to do -- engage in motion practice
7 solely on the sufficiency issue.

8 MS. BOSMAN: Correct, Your Honor. I think that the
9 defense counsel -- I speak right now for APP, but I believe
10 that we are all on board with that. I think that from our
11 review, again, we do not find that they pled market share
12 liability. If they did, we would agree that it does not make
13 sense to move on an Iqbal standard for that.

14 However, I think at this point we would propose to
15 move forward on Iqbal for each of the amended complaints
16 unless, of course, the plaintiffs do point out for us where
17 the market share liability allegations are. If there are
18 complaints that have those and it would no longer be subject
19 to the 12(b)(6) under Iqbal, I think it would make sense to
20 hold onto those and then to deal with that when we deal with
21 the other motions to dismiss that we'll deal with, statute of
22 limitations issues. That way for the Court we can do the --
23 how we would see it is in two motions, two groups of motions
24 so that you're not flooded with all of them at one point.

25 THE COURT: All right. May I just discuss this

1 rule -- proposed Rule 41 basis for dismissal, that is failure
2 to comply with court orders and to prosecute? I'm sure you're
3 familiar with the law in the Second Circuit but it has to be a
4 little bit more than -- I mean, I shouldn't say even "a little
5 bit more." It's got to be quite a bit more than define one
6 discovery order to do something.

7 Now, if you can establish that the Judge entered
8 multiple orders -- and I actually do remember this from the
9 first meeting, so I'm a little shocked to hear it hasn't been
10 done, but the first meeting that I met -- where I sat with
11 Judge Gold it was very clear that there was an understanding
12 that the plaintiffs would provide authorizations, HIPAA
13 compliant authorizations to -- for every plaintiff and that
14 that would be done forthwith and it's without delay. I don't
15 know how many subsequent orders Judge Gold entered to that
16 effect, but I don't know that dismissal -- if it was that one
17 situation, but I think it is probably more than one -- the
18 first conference and then the January -- I'm sorry, it was the
19 December order I think where he most recently ordered again
20 the authorizations -- that still may not be enough under the
21 Second Circuit to actually dismiss a case under Rule 41 unless
22 there was a warning to the plaintiff that if you don't do it
23 by January 7th and this is your last opportunity you may be
24 submit to a dismissal under Rule 41. Was that done?

25 MR. VECCHIONE: Your Honor, this is John Vecchione.

1 First, I think I've provided my relief with excepting the one
2 case where I'm substituting and I think I've said in my
3 pleadings why that was. Whether they have dates -- the
4 only -- they were all provided but then at the last conference
5 there was a question of whether they had dates on them and I
6 had a -- of course, I said on the line if there was any
7 problems with mine please call me. I have not gotten any
8 calls so there's -- there's even a more -- there's a factual
9 issue here.

10 And the other thing is I have said that I will
11 stipulate that they can strike any dates they find on any of
12 the releases I've provided, so I believe that that's a tempest
13 in the teapot for most of these.

14 MR. OSBORN: Your Honor, this is Mr. Osborn. Since
15 the January 2010 time frame the plaintiffs have provided
16 hundreds of authorizations so we have made every effort to
17 comply. I think Mr. Vecchione is correct. There's sort of
18 two issues. One is there may be a handful that are
19 outstanding and we have asked the defendants to identify those
20 plaintiffs for whom they believe authorizations are
21 outstanding.

22 I don't have any complaints currently or any names
23 for whom I've been given that information, but Mr. Vecchione
24 is right. There's an issue about the form of the
25 authorizations. I've been working with Ms. Gaarder to try and

1 resolve that as to whether the authorizations when they are
2 provided are to be undated and blank in terms of the facility.
3 And we got a little bit hung up on that but I think that's
4 something that the parties can work out. I don't quite
5 understand all the smoke about the authorizations either as
6 Mr. Vecchione just described. I thought we were pretty well
7 done with all of that.

8 THE COURT: Well, look. Hopefully everyone is going
9 to be mindful of the Rule 11 and will not submit something for
10 my decision if there's not a factual basis for it, but I
11 just -- I think that at least we can agree that these are
12 quite a bit later than the Court and the parties might have
13 anticipated back at the first conference. And you may have
14 well provided them recently and they may not comply to the
15 letter with Judge Gold's order dated September 17th of 2010
16 directing that they be undated, but hopefully -- I mean, the
17 plaintiffs ought to know which of the authorizations they have
18 provided comply and don't comply with the letter and spirit of
19 the order.

20 I'm just saying that it's a very tough basis to get
21 a dismissal so I'm just trying to save perhaps briefing on
22 that issue unless, you know, you feel that you have really met
23 the repeated -- the plaintiffs have met the repeated failures
24 to comply with court orders to do an act by date certain.

25 In any event, the defendants had proposed a briefing

1 schedule to start 45 days after this conference which seems
2 fine to me. If anyone has any -- and you will -- the
3 defendants will determine which complaints allege market share
4 and which don't. And maybe before you start your briefing you
5 might want to just get information from each of the
6 plaintiffs' counsel who insist that they have, in fact, pled
7 it and look at their -- the paragraphs they cite and decide
8 whether or not it's sufficient. So --

9 MS. BOSMAN: We will do that, Your Honor.

10 THE COURT: All right. The other thing I would like
11 to encourage the parties to do if there is a way to do it
12 could you coordinate your briefing or how do the defendants
13 envision their motions? Did they -- was it each lawyer was
14 going to brief on behalf of their own client or was there
15 going to be coordinated briefing or what was --

16 MS. BOSMAN: Your Honor, the defendants are willing,
17 I believe, to coordinate and to -- it is something where I
18 think we can file it as one joint motion.

19 THE COURT: Okay. Great.

20 MR. VECCHIONE: And, Your Honor, on that subject --
21 this is John Vecchione again -- I filed all my complaint -- I
22 moved to December, which was unopposed and they were severed,
23 and then I amended my complaints and expected to be able to
24 put them in a different -- under a different number. That
25 hadn't been -- although there was severance there was no

1 electronic way to do that. And I guess I have to call the
2 clerk's office and figure out how to get a separate number
3 because it's severed but when you electronically file it, it's
4 still in the same place. So I will call the clerk's office
5 and see how to fix it. I've never run into this problem
6 before but I just wanted all litigants to hear why I did it
7 that way.

8 THE COURT: All right. Yes, they should be able to
9 assist you.

10 MS. BOSMAN: Your Honor, a procedural rule. I know
11 that your chamber rules say that motions are not to be filed
12 until they are fully briefed. Does that mean you would like
13 us to wait until -- just to exchange our motion with the
14 plaintiff?

15 THE COURT: That's generally --

16 MS. BOSMAN: Wait till we have all of it?

17 THE COURT: Yeah. That's generally how it works. I
18 mean, it does -- it's not to say that you can't -- cannot
19 serve your two courtesy copies on us as you serve the
20 plaintiffs.

21 MS. BOSMAN: Okay.

22 THE COURT: But -- and that might be a good idea
23 just because we'll start accumulating the moving papers but it
24 does not get filed by ECF until the reply and then everything
25 should be filed together.

1 So 45 days you can confirm in a letter what those
2 dates are. I think that those -- that seems like a fine time
3 frame unless the plaintiffs tell me differently.

4 MR. OSBORN: Your Honor, Mr. Osborn again. Are we
5 dispensing with the idea of maybe meeting to narrow the number
6 of plaintiffs or --

7 THE COURT: Well, if you want --

8 MR. OSBORN: If we sent in --

9 THE COURT: If you want to dismiss claims and
10 dismiss, you know, take certain plaintiffs out of the cases
11 you can do that without a meeting, can't you?

12 MR. OSBORN: There's --

13 THE COURT: I'm just worried about --

14 MR. OSBORN: Your Honor, yeah, but there's --

15 THE COURT: I'm just worried about the cost.

16 MR. OSBORN: Yeah. I'm sorry. I think I spoke over
17 you, Judge.

18 THE COURT: No. I'm sorry. I'm just worried about
19 the cost associated with, you know, dragging everyone to a
20 meeting when you can pretty much --

21 MR. OSBORN: No --

22 THE COURT: -- determine which ones you -- which
23 plaintiffs you can cut loose and just --

24 MR. OSBORN: Well, the flip side to that is, Your
25 Honor, that there are plaintiffs for whom on our Schedule B

1 we've identified the specific manufacturers. And I guess the
2 defendants don't believe us so they're going to move as to
3 certain people that we've identified the manufacturer to by
4 IDC number as to who provided the drug to our client. So I
5 was hoping that we could work both sides which is we would
6 dismiss those and they would acknowledge that there are some
7 who have adequately pled product identification.

8 MS. BOSMAN: Your Honor, this is Erin Bosman. I
9 think I can speak for the defendants and say that we would be
10 willing to have a conference call with the plaintiffs to
11 discuss these issues, to also discuss which complaints they
12 believe allege market share liability. Clearly we do not want
13 to have to bring a motion and go through the motion practice
14 for those where it is not needed. I would propose that we
15 would then send a letter to you to let you know that the 45
16 days could start after we do that conference call.

17 THE COURT: That's fine.

18 MS. BOSMAN: And that we would then state if we came
19 to an agreement that there were not -- we were not going to
20 move on the Iqbal bases for certain plaintiffs, that we would
21 put that in the letter and that we would be deferred from
22 having to move, though, on other grounds for those plaintiffs
23 until we get through the Iqbal for the rest of the plaintiffs
24 so we don't have two different briefings going at the exact
25 same time. That way we can narrow it down if possible and we

1 can agree to defer those until this briefing is complete on
2 Iqbal.

3 THE COURT: Are the plaintiffs willing -- I mean,
4 that sounds reasonable to me. Do the plaintiffs' counsel
5 agree?

6 MR. OSBORN: Sure. This is Mr. Osborn, sure.

7 MR. GERMANY: No problem from Germany.

8 THE COURT: All right.

9 MR. VECCHIONE: Nor I, Your Honor.

10 THE COURT: All right. So all plaintiffs counsel
11 are in agreement.

12 Okay. So should we set just a rough date then for
13 the parties to have their conference call or calls and then
14 write us that letter that Ms. Bosman proposes? How much time
15 do you think, 30 days from now?

16 MS. BOSMAN: That would be fine, Your Honor.

17 THE COURT: All right. So this would be a jointly
18 submitted letter on or about March 3rd regarding the outcome
19 of these conferences and what will be briefed and an agreement
20 that defendants will not, you know, lose any right to move on
21 other grounds. All right. Well, I appreciate your efforts to
22 try to get as much of this narrowed as you can. I do think
23 that the case does have to move forward so I think we have a
24 plan to then advance those motions within 45 days of March
25 3rd.

1 MS. BOSMAN: Thank you, Your Honor.

2 THE COURT: Okay. All right. Thank you all.

3 MR. OSBORN: -- Judge.

4 THE COURT: Yes. Is everything all right? Okay.

5 Good.

6 MS. BOSMAN: Thank you, Your Honor.

7 THE COURT: Thanks. Have a good day.

8 ATTORNEYS: Thank you.

9 (Proceedings concluded at 3:36 p.m.)

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1 I certify that the foregoing is a court transcript
2 from an electronic sound recording of the proceedings in the
3 above-entitled matter.

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6 _____
7 Ruth Ann Hager

8 Dated: February 4, 2011
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